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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
(SOUTHERN DIVISION – SANTA ANA)

In Re: Toyota Motor Corp. Unintended  
Acceleration Marketing, Sales  
Practices, and Products Liability Litigation

This document relates to:

PERSONAL INJURY/WRONGFUL DEATH  
CASES

) Case No. 8:10ML02151 JVS (FMOx)  
)  
) Assigned to: Hon. James V. Selna  
) Discovery: Mag. Fernando M. Olguin  
)  
) NOTICE OF MOTION AND MOTION  
) OF DEFENDANTS TOYOTA MOTOR  
) SALES, U.S.A., INC., TOYOTA MOTOR  
) CORPORATION, TOYOTA MOTOR  
) NORTH AMERICA, INC., TOYOTA  
) MOTOR ENGINEERING &  
) MANUFACTURING NORTH AMERICA,  
) INC., TOYOTA MOTOR  
) MANUFACTURING, CALIFORNIA, INC.  
) AND CTS CORPORATION TO DISMISS  
) CERTAIN CLAIMS FOR FAILURE TO  
) STATE A CLAIM; MEMORANDUM OF  
) POINTS AND AUTHORITIES IN  
) SUPPORT THEREOF

DATE: November 19, 2010  
TIME: 9:00 AM  
DEPT: Courtroom 10C

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND TO THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 19, 2010 at 9:00 a.m. or as soon thereafter as the matter may be heard in Courtroom 10C of the Ronald Reagan Federal Building and U.S. Courthouse at 411 W. Fourth Street, Santa Ana, California, defendants Toyota Motor Sales, U.S.A., Inc., Toyota Motor Corporation, Toyota Motor North America, Inc., Toyota Motor Engineering & Manufacturing North America, Inc., Toyota Motor Manufacturing California, Inc. and CTS Corporation will move this Court for an order:

1. Dismissing plaintiffs' complaints under Federal Rules of Civil Procedure, Rule 12(b)(6) on the grounds that the complaints fail to state a claim upon which relief may be granted. Defendants seek dismissal of the negligence and products liability claims for relief against all plaintiffs;

2. Dismissing plaintiffs' claims for breach of express and/or implied warranty of merchantability for failure to state a claim upon which relief can be granted. Specifically, the complaints fail to allege facts showing the existence of vertical privity between the parties. Moreover, plaintiffs have not alleged the express warranty claimed to have been breached by the defendants. Defendants seek dismissal of this claim for relief against certain plaintiffs as delineated on the dismissal chart below;

3. Dismissing plaintiffs' claims for breach of implied warranty of fitness for a particular purpose for failure to state a claim upon which relief can be granted. In these actions involving ordinary passenger vehicles, plaintiffs have not made any allegations that would support a "particular purpose" claim. Defendants seek dismissal of this claim for relief against certain plaintiffs as delineated on the dismissal chart below;

4. Dismissing plaintiffs' claims for breach of the covenant of good faith and fair dealing for failure to state a claim upon which relief can be granted. Defendants seek

1 dismissal of this claim for relief against certain plaintiffs as delineated on the dismissal chart  
2 below;

3 5. Dismissing plaintiffs' claims for fraudulent concealment for failure to state a  
4 claim upon which relief can be granted. The parties were not in a fiduciary or confidential  
5 relationship. Absent a fiduciary or confidential relationship between the parties, plaintiffs  
6 must allege facts demonstrating that a duty to disclose arose through defendants' conduct,  
7 which has not been done in this case. Defendants seek dismissal of this claim for relief  
8 against certain plaintiffs as delineated on the dismissal chart below;

9 6. Dismissing plaintiffs' claims for intentional and negligent misrepresentation for  
10 failure to state a claim upon which relief can be granted. Plaintiffs have not identified any  
11 representations of fact made by the Toyota Defendants that were not true. Plaintiffs' claims  
12 for misrepresentation are based on Toyota's opinions about the safety and reliability of its  
13 vehicles. Opinions as to quality or value of a product are not actionable under California  
14 Civil Code sections 1572 or 1710. Defendants seek dismissal of this claim for relief against  
15 certain plaintiffs as delineated on the dismissal chart below;

16 7. Dismissing plaintiffs' claims under Business and Professions Code sections  
17 17200 and 17500 for failure to state a claim upon which relief can be granted. Plaintiffs  
18 have not identified what advertisements disseminated by the defendants were false or  
19 misleading. Unless plaintiffs can identify advertising that is actually false or misleading (as  
20 opposed to puffery) this claim should be dismissed. Moreover, relief under these statutes  
21 is not available to out-of-state plaintiffs seeking to regulate conduct occurring outside of  
22 California. Defendants seek dismissal of this claim for relief against certain plaintiffs as  
23 delineated on the dismissal chart below;

24 8. Dismissing plaintiffs' claims for fraud, concealment, misrepresentation, unfair  
25 competition and false advertising for failure to state with particularity the circumstances

constituting fraud or mistake as required under Rule 9(b) of the Federal Rules of Civil Procedure. Defendants seek dismissal of this claim for relief against certain plaintiffs as delineated on the dismissal chart below.

This motion is made following the conference of counsel pursuant to L.R. 7.3 as set forth fully in the Declaration of Anne O. Hanna filed herewith.

Case Name and Number	1. Negligence & Strict Products Liability- ETCS-i	2A. Implied Warranty	2B. Express Warranty	3. Particular Purpose Warranty	4. The Covenant of Good Faith & Fair Dealing	5. Fraudulent Concealment	6. Misrepresentation	7. Unfair Comp. and /or False Advertising	8. Failure to Plead Fraud w/ Particularity – Rule 9(b)
Akamike 2:10CV06081 JVS (FMOx)	x	x	x		x	x	x	x	x
Aukland 2:10CV06082 JVS (FMOx)	x	x	x		x	x	x	x	x
Barlow (FAC) 2:10CV01902 JVS (FMOx)	x	x		x		x			x
Bond 2:10CV03565 JVS (FMOx)	x	x		x		x		x	x
Broden (FAC) 2:10CV02228 JVS (FMOx)	x	x	x			x			x
Burack 2:10CV03254 JVS (FMOx)	x	x	x						
Cangelosi 2:10CV01997 JVS (FMOx)	x	x		x		x		x	x
Carmichael (FAC) 2:10CV02943 JVS (FMOx)	x	x	x			x		x	x
Chang (FAC) 2:10CV01993 JVS (FMOx)	x	x		x		x			x
Christian (FAC) 2:10CV01806 JVS (FMOx)	x	x		x		x			x
Crank (FAC) 2:10CV01821 JVS (FMOx)	x	x		x		x			x
Cruikshank 8:10CV00780 JVS (FMOx)	x	x	x	x		x			x
Devlin (FAC) 8:10CV00616 JVS (FMOx)	x	x		x		x			x
Dion 2:10CV03237 JVS (FMOx)	x	x		x		x		x	x
Donoghue 2:10CV01057 JVS (FMOx)	x	x		x		x		x	x

Case Name and Number	1. Negligence & Strict Products Liability- ETCS-i	2A. Implied Warranty	2B. Express Warranty	3. Particular Purpose Warranty	4. The Covenant of Good Faith & Fair Dealing	5. Fraudulent Concealment	6. Misrepresentation	7. Unfair Comp. and /or False Advertising	8. Failure to Plead Fraud w/ Particularity – Rule 9(b)
Elmes 2:08CV01300 [Bloch]*	x	x	x						
Flury 2:10CV01584 JVS (FMOx)	x	x		x		x		x	x
Fontenot 8:10CV00748 JVS (FMOx)	x	x					x		x
Fox (FAC) 8:10CV00604 JVS (FMOx)	x	x		x		x	x		x
Green 1:10CV04302 [Eve]*	x								
Hanna (FAC) 2:10CV01756 JVS (FMOx)	x	x		x		x			x
Ifergan 1:10CV01116 JVS (FMOx)	x	x							
Izenstark 1:10CV04350 [Leinenweber]*	x								
Jimerson 8:10CV00997 JVS (FMOx)	x	x							
G. Johnson 8:10CV00575 JVS (FMOx)	x	x							
King 2:10CV03255 JVS (FMOx)	x								
Krieger (FAC) 2:10CV01753 JVS (FMOx)	x	x		x		x			x
Lauderdale 2:10CV02940 JVS (FMOx)	x	x	x			x			x
Livingston (FAC) 2:10CV01290 JVS (FMOx)	x	x		x		x			x
Mitchell 8:10CV01206 JVS (FMOx)	x	x	x						
Morgan 8:10CV00999 JVS (FMOx)	x	x	x			x	x		x
Murphy 8:10CV00749 JVS (FMOx)	x	x	x	x					
Pittman 2:10CV00761 [unassigned]*	x	x	x			x	x		x
Rhooms 2:10CV02944 JVS (FMOx)	x	x	x			x			x
Roberts (FAC) 2:10CV01986 JVS (FMOx)	x	x		x		x			x
Rookard 8:10CV01004 JVS (FMOx)	x	x							

Case Name and Number	1. Negligence & Strict Products Liability - ETCS-i	2A. Implied Warranty	2B. Express Warranty	3. Particular Purpose Warranty	4. The Covenant of Good Faith & Fair Dealing	5. Fraudulent Concealment	6. Misrepresentation	7. Unfair Comp. and/or False Advertising	8. Failure to Plead Fraud w/ Particularity - Rule 9(b)
Ross 2:10CV05700 JVS (FMOx)	x	x	x		x	x	x	x	x
Schreckengost 2:10CV06088 JVS (FMOx)	x	x	x		x	x	x	x	x
Schwartz 2:10CV00710 JVS (FMOx)	x	x		x				x	x
Scott 8:10CV1156 JVS (FMOx)	x	x	x			x			x
Sims 8:10CV00998 JVS (FMOx)	x								
St. John 4:10CV00075 [Land]*	x								
Wachtel 2:10CV03899 JVS (FMOx)	x	x	x		x	x	x	x	x
Warren (FAC) 2:10CV01650 JVS (FMOx)	x	x		x		x			x
Weinberger 8:10CV01002 JVS (FMOx)	x	x	x			x			x
West 2:10CV02938 JVS (FMOx)	x	x	x			x		x	x
Williams, H. (FAC) 2:10CV01366 JVS (FMOx)	x	x		x		x			x
Williams, R. 2:10CV01438 JVS (FMOx)	x	x	x			x			x
Khakli 1:10CV03999 [Castel]*	x	x	x						
Young 8:10CV01095 JVS (FMOx)	x	x	x	x		x	x		x

\* In the process of being transferred. It is anticipated these cases will be in the MDL before the November 19, 2010 hearing date.

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1 This motion will be based upon this Notice of Motion and Motion, the Memorandum  
2 of Points and Authorities in support hereof, the Request for Judicial Notice, on such oral  
3 and documentary evidence may be introduced at the time of the hearing, and on all papers  
4 and pleadings on file with the court herein.

5 Dated: September 13, 2010

Respectfully submitted,

6 By: /s/ Vincent Galvin

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15 Lead Defense Counsel for Personal Injury/Wrongful  
16 Death Cases  
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This multidistrict litigation action concerns automobile accidents involving various Toyota vehicles produced since 2000. Each of the accidents in question is alleged to have been preceded by a sudden, unintended acceleration event in the involved subject vehicles. In some of the complaints, plaintiffs allege that the unintended acceleration event combined with an inability to stop the vehicle by applying the brake. Plaintiffs theorize that these alleged unintended acceleration events are somehow related to the electronic throttle control system in certain Toyota vehicles. Plaintiffs pursue claims against Toyota Motor Sales, U.S.A., Toyota Motor Corporation, Inc., Toyota Motor North America, Inc., Toyota Motor Engineering & Manufacturing North America, Inc., Toyota Motor Manufacturing, California, Inc. and CTS Corporation (collectively "Toyota Defendants") for negligence, strict products liability, breach of express and implied warranties, fraudulent concealment, misrepresentation, and for violation of California Business and Professions Code sections 17200 and 17500.

Defendants seek dismissal of the entire action pursuant to Federal Rules of Civil Procedure Rule 12(b)(6) on the grounds that plaintiffs have failed to state a claim upon which relief can be granted for negligence and strict products liability as it relates to the subject vehicles. Although plaintiffs claim without any support that Toyota vehicles have a past history of unintended acceleration events, plaintiffs have failed to allege with the requisite specificity any alleged defect in the subject vehicles.

Defendants also seek dismissal of certain claims for relief that appear in all or a substantial number of the personal injury / wrongful death actions. Specifically, this motion seeks the dismissal of plaintiffs' claims for (1) breach of express and / or implied warranty; (2) fraudulent concealment; (3) misrepresentation; and (4) violation of California Business and

Professions Code sections 17200 and 17500 for failure to state a claim upon which relief can be granted. Defendants intend to raise issues unique to particular plaintiffs in separately filed motions.

## II. PLAINTIFFS' ALLEGATIONS

This multidistrict action involves numerous complaints alleging personal injury or wrongful death arising from sudden, unintended acceleration events involving various Toyota and Lexus vehicles. The numerous individual complaints filed in this action rely on similar allegations in an attempt to support each plaintiff's claims for relief. For purposes of expediency and clarity, the arguments in this motion are based on the Roberts complaint (2:10CV01986 JVS (FMOx)) (Attached hereto as Exhibit A is a true and correct courtesy copy of the Roberts complaint), the Scott complaint (8:10CV01156 JVS (FMOx)) (Attached hereto as Exhibit B is a true and correct courtesy copy of the Scott complaint) and the Akamike complaint (2:10CV06081 JVS (FMOx)) (Attached hereto as Exhibit C is a true and correct courtesy copy of the Akamike complaint) These complaints are selected as exemplar complaints for purposes of this motion because (1) they include many of the insufficient allegations; and (2) the claims made in the other complaints filed in this action are very similar and frequently identical to the claims in the Roberts, Scott and Akamike complaints.<sup>1</sup>

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<sup>1</sup> The Roberts complaint was prepared by Lieff, Cabraser, Heimann & Bernstein, LLP. This law firm has prepared or associated in on approximately 25 of the personal injury complaints filed in this action. The law firm that prepared the Scott complaint, Robinson, Calcagnie & Robinson, has prepared at least six other personal injury complaints filed in this action. The Lanier Law Firm prepared the Akamike complaint and has at least three other matters in this MDL. Many other complaints filed in this action incorporate verbatim the language contained in these three complaints, and the rest borrow heavily from these three complaints.

1 Plaintiffs allege the following:

2 1. Certain models of Toyota and Lexus brand vehicles have an unidentified  
3 defect that causes sudden, unintended acceleration to speeds up to 100 miles per hour.  
4 Roberts First Amended Complaint for Damages ("Roberts") ¶ 6; Akamike Complaint for  
5 Damages ("Akamike") ¶ 13.

6 2. This defect combines with the operator's inability to stop the vehicle during a  
7 sudden, unintended acceleration event due to the absence of an alleged failsafe that would  
8 automatically reduce the engine to idle when the brake is applied. Roberts ¶¶ 7, 11, 46;  
9 Akamike ¶¶ 13, 24; Scott Complaint for Damages ("Scott") ¶ 3.

10 3. The Electronic Throttle Control System with Intelligence ("ETCS-i") controls  
11 the throttle valve on the engine through electronic signals rather than a physical linkage  
12 between the gas pedal and the engine throttle. Roberts ¶ 41; Scott ¶ 24; Akamike ¶ 24. An  
13 electronic sensor at the accelerator detects how far the pedal is depressed. Roberts ¶ 41.  
14 This information is then transmitted to a computer module that controls a motorized engine  
15 throttle. Id. The computer module determines how far the accelerator pedal has been  
16 depressed and, in turn, tells the throttle motor how far to open the throttle valve to power the  
17 engine. Id.

18 4. The ETCS-i does not include: (a) mechanical linkage between the accelerator  
19 pedal and the engine throttle control; and (b) a failsafe that automatically tells the ETCS-i to  
20 reduce the engine to idle when the brake is applied. Roberts ¶¶ 41-46; Akamike ¶¶ 24-25.  
21 The mechanical linkage is a necessary "safety system" without which the ETCS-i may "set the  
22 engine throttle to any position regardless of the accelerator position." Akamike ¶ 25. A  
23 "brake-to-idle override" was a necessary safety system that was absent in Toyota and Lexus  
24 vehicles during the times complained of. Roberts ¶¶ 11, 46; Scott ¶¶ 3, 7; Akamike ¶¶ 24-25.

25 ///

1           5.     The vehicles that were equipped with ETCS-i and their various components  
2 were susceptible to an unidentified malfunction caused by electronic failures such as short  
3 circuits and electromagnetic interference. Roberts ¶¶ 10, 44; Scott ¶ 2. Alternatively, plaintiffs  
4 theorize that the ETCS-i is susceptible to “electronic-related and/or mechanical related  
5 computer/software/hardware glitches.” Scott ¶ 3; see Roberts ¶¶ 10, 44. Although it is  
6 unclear from the pleadings, plaintiffs appear to be alleging that the ETCS-i may somehow be  
7 the reason certain Toyota and Lexus vehicles are experiencing unintended acceleration  
8 events. Roberts ¶¶ 86, 93; Scott ¶¶ 2-3; Akamike ¶¶ 98, 101.

9           6.     Plaintiffs acknowledge a belief that the ETCS-i has a fault detection system but  
10 complain this fault detection system is not robust enough to anticipate sudden unintended  
11 acceleration. Roberts ¶¶ 9, 45; Scott ¶ 2.

12           Each plaintiff contends that the subject accident was the result of a sudden, unintended  
13 acceleration event. Roberts ¶¶ 26-28; Scott ¶¶ 19-20; Akamike ¶ 17. However, plaintiffs do  
14 not and cannot attribute these sudden, unintended acceleration events to a particular defect in  
15 the vehicle. Roberts merely alleges that the “[2009 Camry] suddenly accelerated at a high  
16 rate of speed and he was unable to stop the vehicle by braking.” ¶ 27. Scott alleges only that  
17 her 2004 Prius “suddenly and unexpectedly accelerated . . . through four lanes of traffic and  
18 collided with a fence and then a tree.” ¶ 20. Similarly, Akamike alleges he was driving when  
19 his 2007 Camry “suddenly accelerated, causing the car to flip several times before coming to  
20 a stop.” ¶ 17. Many plaintiffs allege being unable to stop the vehicle. See Roberts ¶ 27;  
21 Scott ¶ 20. The other complaints filed in this action similarly lack attribution in these accidents  
22 to a defect in the subject vehicle. For example:

23           Wilma Lauderdale alleges that on the day of the accident, the 2007 Toyota Yaris she  
24 was driving “suddenly and unexpectedly accelerated and veered out of control striking a curb  
25 at high speed.” Lauderdale Complaint for Damages (2:10 CV02940 JVS (FMOx)) ¶ 12.



1 Steven Burack alleges that he was pulling out of a parking lot when the 2004 Toyota  
2 Camry he was driving “experienced a sudden uncontrolled full-throttle acceleration causing  
3 the vehicle to accelerate at a rapid rate.” Burack First Amended Complaint for Money  
4 Damages (2:10 CV 03254 JVS (FMOx)) ¶ 119.

5 The allegations respecting the events surrounding the accidents are similarly worded in  
6 each individual complaint. That is, each accident is alleged as an unattributed instance where  
7 the vehicle is described to have accelerated on its own and the driver was unable to stop the  
8 vehicle.

9 Plaintiffs allege the following claims for relief: (1) Negligence (Roberts ¶¶ 146-153;  
10 Scott ¶¶ 132-136; Akamike ¶¶ 186-190); (2) Strict Products Liability (Roberts ¶¶ 154-171;  
11 Scott ¶¶ 127-131; Akamike ¶¶ 131-138); (3) Breach of Express and Implied Warranties  
12 (Roberts ¶¶ 172-179; Scott ¶¶ 137-142; Akamike ¶¶ 167-178); (4) Fraudulent Concealment  
13 and Misrepresentation (Roberts ¶¶ 180-188; Scott ¶¶ 118-126; Akamike ¶¶ 139-166); (5)  
14 Breach of the Covenant of Good Faith and Fair Dealing (Akamike ¶¶ 179-185); and (6)  
15 Violation of California Business and Professions Code sections 17200 and 17500 (Akamike  
16 ¶¶ 191-208).

17 III. PLAINTIFFS' CLAIMS ARE FATALLY DEFECTIVE AND MUST BE DISMISSED

18 A. Dismissal of the Complaints Is Appropriate Under Federal Rules of  
19 Civil Procedure 12(b)(6)

20 Defendants are entitled to dismissal under Rule 12(b)(6) if, accepting the allegations  
21 as true, the complaints fail to state facts that would support relief. Parks Sch. of Bus. v.  
22 Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). The Court should not accept as true  
23 “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
24 inferences.” Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001).  
25 Plaintiffs’ “obligation to provide the ‘grounds’ of [their] ‘entitle[ment] to relief’ requires more  
26

1 than labels and conclusions, and a formulaic recitation of the elements of a cause of action  
2 will not do.” Bell Atlantic Corporation v. Twombly, 550 U.S. 544, 555 (2007). Rather, the  
3 allegations “must be enough to raise a right to relief above the speculative level.” Id.

4 “[T]he tenet that a court must accept as true all of the allegations contained in a  
5 complaint is inapplicable to legal conclusions.” Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949  
6 (2009). Rule 8(a)(2) “demands more than an unadorned, the-defendant-unlawfully-  
7 harmed-me accusation.” Id. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic  
8 recitation of the elements of a cause of action will not do.’” Id. (quoting Twombly, 550 U.S.  
9 at 555). “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further  
10 factual enhancement.’” Id. (quoting Twombly, 550 U.S. at 557). The U.S. Supreme Court  
11 explained that “[t]hreadbare recitals of the elements of a cause of action, supported by  
12 mere conclusory statements, do not suffice.” Id. Thus, while courts “must take all of the  
13 factual allegations in the complaint as true” for purposes of a motion to dismiss, courts “are  
14 not bound to accept as true a legal conclusion couched as a factual allegation.” Id. at  
15 1949-50 (internal quotations omitted).

16 “Second, only a complaint that states a plausible claim for relief survives a motion to  
17 dismiss.” Id. at 1950. The U.S. Supreme Court in Iqbal explained:

18 To survive a motion to dismiss, a complaint must contain  
19 sufficient factual matter, accepted as true, to “state a claim to  
20 relief that is plausible on its face.” A claim has facial  
21 plausibility when the plaintiff pleads factual content that  
22 allows the court to draw the reasonable inference that the  
23 defendant is liable for the misconduct alleged. The  
24 plausibility standard is not akin to a “probability requirement,”  
25 but it asks for more than a sheer possibility that a defendant

1 has acted unlawfully. Where a complaint pleads facts that  
2 are “merely consistent with” a defendant’s liability, it “stops  
3 short of the line between possibility and plausibility of  
4 entitlement to relief.”

5 Id. at 1949 (citations omitted). The U.S. Supreme Court concluded:

6 Determining whether a complaint states a plausible claim for  
7 relief will . . . be a context-specific task that requires the  
8 reviewing court to draw on its judicial experience and  
9 common sense. But where the well-pleaded facts do not  
10 permit the court to infer more than the mere possibility of  
11 misconduct, the complaint has alleged — but it has not  
12 ‘show[n]’ — ‘that the pleader is entitled to relief.’

13 Id. (quoting Fed. R. Civ. P. 8(a)(2)).

14 As shown below, the complaints filed in this action should be dismissed because  
15 they fail to sufficiently allege facts that show the plaintiffs’ entitlement to relief.

16 B. Plaintiffs Fail to Allege That the Subject Accidents Were Caused By  
17 A Defect Contained In the Subject Vehicles

18 Common to all of the personal injury / wrongful death complaints filed in this action is  
19 the complete absence of any specific allegations of the actual alleged defect in the ETCS-i  
20 that caused any accidents. Plaintiffs’ complaints are replete with conclusory allegations  
21 regarding anecdotal past incidents of alleged sudden unintended acceleration events taken  
22 from media reports, the National Highway Traffic Safety Administration (“NHTSA”) databases,  
23 and third party complaints. When the pleadings are pared down to the essential factual  
24 allegations concerning each subject vehicle, plaintiffs merely allege: (1) certain Toyota  
25 vehicles are equipped with an electronic throttle control system; (2) there have been

1 unconfirmed past claims of sudden, unintended acceleration occurrences in individual Toyota  
2 vehicles; and (3) plaintiff was in an accident involving a Toyota vehicle. Absent from plaintiffs'  
3 complaints are any identification or description of any alleged defect in the ETCS-i, or  
4 sufficient facts to support a claim of any alleged defect in the ETCS-i, or sufficient facts that  
5 this alleged defect was a substantial factor in causing the subject accident and plaintiffs'  
6 injuries. In effect, plaintiffs infer negligence and strict liability on the part of Toyota based on  
7 unsubstantiated circumstantial information. This is not sufficient to support a products liability  
8 or negligence claim. Unless and until plaintiffs can provide factual allegations of a specific  
9 defect in the ETCS-i that caused the subject vehicle to experience a sudden unintended  
10 acceleration event, plaintiffs' product liability and negligence claims should be dismissed.

11 Plaintiffs allege that Toyota is liable because its vehicles experience sudden,  
12 unintended acceleration events that in the instant cases caused plaintiffs' accidents and  
13 injuries. Plaintiffs assert claims for negligence (Roberts ¶¶ 146-153; Scott ¶¶ 132-136;  
14 Akamike ¶¶ 186-190) and strict products liability, including design defect and failure to warn  
15 (Roberts ¶¶ 154-171; Scott ¶¶ 127-131; Akamike ¶¶ 131-138). Plaintiffs allege that  
16 defendants placed the subject vehicles into the stream of commerce through manufacture,  
17 distribution, or sale. Roberts ¶¶ 33, 147, 155; Scott ¶¶ 13-16, 128, 133; Akamike ¶¶ 6, 12,  
18 132. Plaintiffs conclude without support that the Toyota vehicles are defectively designed  
19 or manufactured and inherently dangerous and have a propensity to suddenly accelerate,  
20 lose control and cause injuries. Roberts ¶¶ 149-150, 131; Akamike ¶ 188. Plaintiffs allege  
21 defendants failed to use due care in the design, manufacture, testing, distribution and sale  
22 of their vehicles (Roberts ¶¶ 151(a), 132; Scott ¶ 134; Akamike ¶¶ 133, 188) and failed to  
23 provide an adequate warning of the vehicles' susceptibility to sudden, unintended  
24 acceleration events and failed to incorporate adequate safeguards and protection against  
25 such incidents (Roberts ¶¶ 151(b-c), 141-142; Scott ¶¶ 2-3; Akamike ¶¶ 136, 187).

1 Rule 8(a)(2) requires that in order to state a claim for relief, a pleading must contain  
2 a "short plain statement of the claim showing that the pleader is entitled to relief." Plaintiffs  
3 can no longer rely on the former standard under which plaintiffs only needed "to give the  
4 defendant fair notice of what the claim is and the grounds upon which it rests." Conley v.  
5 Gibson (1957) 355 U.S. 41, 47 [78 S.Ct. 99, 2 L.Ed.2d 80] (abrogated by Twombly, 550  
6 U.S. 544). After the U.S. Supreme Court's decisions in Iqbal and Twombly, plaintiffs are  
7 now required to have interpreted the general pleading standard delineated in Rule 8 to  
8 mean that a complaint necessarily must contain well-pleaded factual allegations that make  
9 the claim against a defendant not just probable, but "plausible." Iqbal, 129 S.Ct. at 1499  
10 (citing Twombly, 550 U.S. at 556).

11 In Twombly the U.S. Supreme Court reversed the circuit court's decision and  
12 reinstated the district court's dismissal of plaintiffs' complaint, finding that conclusory  
13 allegations in support of the elements of a claim are not sufficient to show that the pleader  
14 is entitled to relief. Twombly, 550 U.S. at 557. The Twombly Court explained:

15 While a complaint attacked by a 12(b)(6) motion to dismiss  
16 does not need detailed factual allegations, a plaintiff's  
17 obligation to provide the "grounds" of his "entitlement to  
18 relief" requires more than labels and conclusions, and a  
19 formulaic recitation of the elements of a cause of action will  
20 not do.

21 Id. at 555 (internal citations omitted). The Twombly Court's interpretation of Rule 8 requires  
22 the pleader to make enough well-pleaded factual allegations to "raise a right to relief above  
23 the speculative level." Id. The court found that naked assertions in a complaint of the  
24 elements of a claim, "but without further factual enhancement[,] stop short of the line  
25 between possibility and plausibility of 'entitle[ment] to relief.'" Id. at 557 (quoting DM

1 Research, Inc. v. College of American Pathologists, 170 F.3d 53, 56 (1<sup>st</sup> Cir. 1999)). The  
2 Court ultimately held that dismissal of plaintiffs' complaint was proper because plaintiffs did  
3 not state enough facts to "nudg[e] their claims across the line from conceivable to  
4 plausible." Id. at 570.

5 Iqbal advanced the Twombly decision in two important ways by: (1) clarifying that  
6 the Twombly pleading standard applies to all federal civil actions; and (2) setting forth a  
7 two-part framework for use in the determination of whether a pleading states a claim. Iqbal,  
8 129 S. Ct. at 1950, 1953. First, Iqbal makes very clear that the heightened Twombly  
9 pleading standard "expounded the pleading standard for 'all civil actions.'" Id. at 1953  
10 (quoting Fed R. Civ. P. 1). All cases governed by the Federal Rules of Civil Procedure  
11 now fall within the broad reach of Iqbal/Twombly.

12 Second, Iqbal set up a road map to aid courts in determining when a litigant has  
13 sufficiently stated a claim. The first step in the analysis is to identify any conclusory  
14 pleading. Iqbal, 129 S. Ct. at 1950. Pleadings that are factually or legally conclusory are  
15 not entitled to a presumption of truth and must be supported by well-plead factual  
16 allegations. Id. "Threadbare recitals of the elements of a claim, supported by mere  
17 conclusory statements, do not suffice." Id. at 1949 (citing Twombly, 550 U.S. at 556).  
18 Where a pleading contains well-pleaded factual allegations, the second step in the  
19 analysis, is to "assume their veracity and determine whether they plausibly give rise to an  
20 entitlement to relief." Id. at 1950. "A claim has facial plausibility when the plaintiff pleads  
21 factual content that allows the court to draw the reasonable inference that the defendant is  
22 liable for the misconduct alleged." Id. at 1949. The Court went on to state that the  
23 standard for plausibility "is not akin to a 'probability requirement,' but it asks for more than a  
24 sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at  
25 556).

1 As demonstrated below, plaintiffs fail to allege facts that place their negligence and  
2 product defect claims across the line from conceivable to plausible. See Twombly, 550 U.S.  
3 at 570. Plaintiffs allege no facts revealing what is claimed to be wrong with the ETCS-i.  
4 Rather, plaintiffs ask defendants and this Court to assume that "certain of Toyota's cars  
5 and trucks have a defect that causes sudden uncontrolled acceleration to speeds of up to  
6 100 miles per hour or more" (Roberts ¶ 2; Akamike ¶ 13), that "there are serious safety  
7 defects in Toyota vehicles" (Scott ¶ 23) and that "the causes of unintended acceleration  
8 include unsafe electronic defects" (Akamike ¶ 23). Unable to identify what specific defect, if  
9 any, is causing the alleged sudden unintended acceleration events, plaintiffs merely  
10 surmise that the problem could be "electronic-related and/or mechanical related computer /  
11 software / hardware glitches." Scott ¶¶ 2-3. This is not sufficient. Plaintiffs must do more  
12 than speculate that a wrong has been committed and demand relief.

13 Considering only the non-conclusory factual allegations in the complaints, as Iqbal  
14 directs, plaintiffs allege that:

15 1. Beginning in the late 1990s, Toyota vehicles were equipped with an electronic  
16 throttle control system. Roberts ¶ 40; Scott ¶ 24; Akamike ¶ 24.

17 2. An electric throttle control system uses electronic signals rather than a  
18 mechanical linkage to determine how far the accelerator has been pressed and adjust the  
19 engine throttle accordingly. Roberts ¶ 41; Scott ¶ 24; Akamike ¶ 24.

20 3. Until 2001, Toyota vehicles included a mechanical linkage between the  
21 accelerator pedal and the throttle control. Roberts ¶ 43; Scott ¶ 24; Akamike ¶ 24.

22 4. The electronic throttle control system in Toyota vehicles does not have a  
23 "brake-to-idle" function that automatically reduces the engine to idle when the brakes are  
24 applied. Roberts ¶¶ 11, 46; Scott ¶¶ 3, 7; Akamike ¶ 24.

25 ///



5. NHTSA has investigated claims of surging and acceleration events involving Toyota vehicles. Roberts ¶¶ 49-107; Scott ¶¶ 23-61; Akamike ¶¶ 33-98.

6. Toyota recalled certain vehicles concerning potential floor mat interference with the accelerator pedal (Roberts ¶¶ 67, 74-75(a) at 13:18-19; Scott ¶¶ 40, 45-47; Akamike ¶¶ 85-89) and sticking accelerator pedals (Roberts ¶ 77(a); Scott ¶ 49; Akamike ¶ 96).

7. There have been other motor vehicle accidents involving Toyota vehicles. Roberts ¶¶ 72; Scott ¶ 44; Akamike ¶¶ 60, 67, 84.

8. Plaintiffs were in a motor vehicle accident. Roberts ¶ 27; Scott ¶ 20; Akamike ¶ 17.

Setting aside the conclusory allegations contained in the "history" sections of the complaints, it is alleged consumers at various times since 2001 have petitioned NHTSA to investigate unsubstantiated unintended acceleration events in Toyota vehicles. Roberts ¶¶ 51-52, 55-56, 65, 68-69, 71; Scott ¶¶ 26, 28-29, 32, 35-38, 41, 43, 48; Akamike ¶¶ 41-42, 46-48, 52-53, 57-58, 61-66, 69-73, 77-79, 82. None of these investigations resulted in NHTSA's identification of a defect in the electronic throttle control system of various Toyota vehicles. Roberts ¶¶ 59, 63, 65, 69; Scott ¶¶ 30, 35, 37-38, 42; Akamike ¶¶ 45, 50, 55, 61-62, 79, 81, 90, 92.

When whittled down to what have been pled as facts, plaintiffs' otherwise omnibus allegations relating to the claims of the Toyota Defendants' liability and negligence can be stated as follows:

- (1) Toyota vehicles are equipped with an electronic throttle control system;
- (2) NHTSA has opened and closed investigations without directing Toyota to take any actions concerning its vehicles' electronic throttle control system;
- (3) Toyota has issued recalls that are not related to the ETCS-i;



(4) Plaintiff was in an accident while in a Toyota or Lexus vehicle;

(5) Plaintiff claims he experienced a sudden, unintended acceleration incident that resulted in his accident.

The complaints filed in this action therefore fail to allege a factual nexus among these five claimed incidences. Among the many conclusory allegations in the Roberts and Akamike complaints are statements that “the vehicles’ electronics cannot be ruled out as a likely cause of the [sudden, unintended acceleration] incidents” (Roberts ¶ 86; Akamike ¶ 98 (emphasis added)) and that “the ETCS is the likely cause of [unintended acceleration]” (Roberts ¶ 89; Akamike ¶ 101 (emphasis added)). The Scott complaint similarly rejoins that “certain of [Toyota’s] vehicles . . . contained the Defects in the acceleration control and throttle system.” Scott ¶ 119. Scott speculates without any support that the defect involves an (unidentified) malfunction that may be electronic or mechanical and could involve a glitch in the vehicles’ computer, software, or hardware. Scott ¶¶ 2-3. The complaints therefore lack sufficient factual allegations to support the conclusion that a sudden unintended acceleration was caused by a particular defect in the throttle control system. This shortcoming warrants dismissal of the complaints under Iqbal / Twombly.

The fact that Toyota vehicles are equipped with ETCS-i and the fact that consumers in the past have complained about unsubstantiated surging, accelerating or other events is not enough to nudge the possibility that plaintiffs’ particular unattributed acceleration event was caused by a defect in the ETCS-i past the line of plausibility. Indeed, “[i]t is not enough to allege that a product line contains a defect or that a product is at risk for manifesting this defect; rather, the plaintiffs must allege that their product actually exhibited the alleged defect.” O’Neil v. Simplicity, Inc., 574 F.3d 501, 503 (8th Cir. 2009). This is because “liability arising from defective manufactured products is premised on proof of a causal

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1 relationship [cause in fact] between the defect and the injury.” Greening v. General Air  
2 Conditioning Corporation (1965) 233 Cal. App. 2d 545, 549.

3 Plaintiffs have concluded, not shown, that the subject accidents were caused by a  
4 specific defect in the ETCS-i. Thus, under the standards enunciated by Federal Rules of  
5 Civil Procedure, Rule 8, and by the U.S. Supreme Court in Twombly and Iqbal, plaintiffs  
6 have failed to plead enough facts to make their claim “plausible” not just probable, and  
7 plaintiffs clearly fall short of satisfying the heightened factual burden necessary to state a  
8 claim in this case. The complaints, therefore, should be dismissed.

9 C. Plaintiffs Fail to State a Claim For Breach of the Implied Warranty  
10 of Merchantability and Fitness for A Particular Purpose Because  
11 The Requisite Privity Does Not Exist Between Plaintiffs and Toyota

12 Plaintiffs assert a claim for breach of the implied warranty of merchantability.  
13 Roberts ¶¶ 172-179; Scott ¶¶ 137-142; Akamike ¶¶ 173-178. Specifically, plaintiffs allege  
14 that the Toyota vehicles in question were impliedly warranted to be “of merchantable quality  
15 and was safe for the use for which it was intended by the defendants, namely, for the  
16 purpose of use as a passenger vehicle, and other related activities.” Roberts ¶ 173; see  
17 Scott ¶¶ 138-139; Akamike ¶¶ 174-175. To the extent it is concluded by the plaintiffs that  
18 the vehicles in question were defective and dangerous, it is further concluded that Toyota  
19 breached an implied warranty of merchantability with the plaintiffs. Roberts ¶ 175; Scott ¶¶  
20 138, 142; Akamike ¶ 174. Plaintiffs’ claims for breach of implied warranty of  
21 merchantability fail as a matter of law because plaintiffs do not (and cannot) allege vertical  
22 privity with the Toyota Defendants to support such claims.

23 In order to recover on a theory of breach of implied warranty of fitness and  
24 merchantability, plaintiff must first demonstrate that he purchased the vehicle from  
25 defendants. CACI Nos. 1231, 1232. It is well-established that “[p]rivacy of contract is a  
26 prerequisite in California for recovery on a theory of breach of implied warranties of fitness

1 and merchantability.” United States Roofing, Inc. v. Credit Alliance Corp. (1991) 228 Cal.  
2 App. 3d 1431, 1441. Or stated another way, a prospective plaintiff must first show the  
3 existence of vertical privity with the defendant. Id. “The term ‘vertical privity’ refers to links in  
4 the chain of distribution of goods. If the buyer and seller occupy adjoining links in the  
5 chain, they are in vertical privity with each other.” Osborne v. Subaru of America (1988)  
6 198 Cal. App. 3d 646, 656, n.6 (internal quotation omitted).

7 “A demurrer is properly sustainable in an action predicated upon a breach of an  
8 implied warranty when lack of privity between plaintiff and defendant is disclosed on the  
9 face of the complaint.” Anthony v. Kelsey-Hayes Co. (1972) 25 Cal. App. 3d 442, 448.  
10 This rule would apply here and plaintiffs’ implied warranty claims fail as a matter of law.  
11 Plaintiffs allege that Toyota sold its vehicles. Roberts ¶¶ 33, 147, 155; Scott ¶¶ 13-16;  
12 Akamike ¶¶ 6, 12. However, plaintiffs have not alleged that any plaintiff purchased the  
13 subject vehicle from the Toyota Defendants or that any plaintiff was the original purchaser.  
14 The complaints also do not contain allegations that the Toyota Defendants are involved in any  
15 way in the negotiation of the purchases.

16 Courts applying California law have repeatedly recognized the privity rule in rejecting  
17 implied warranty claims brought by purchasers against car manufacturers where the  
18 vehicle was purchased from a dealer. See Clemens v. Daimler-Chrysler Corp., 534 F.3d  
19 1017, 1023 (9th Cir. 2008) (affirming dismissal of breach of implied warranty claim for  
20 failure to state a claim because plaintiff purchased vehicle from dealer and explaining that  
21 “an end consumer such as Clemens who buys from a retailer is not in privity with the  
22 manufacturer”); Osborne v. Subaru of Am., Inc., 198 Cal. App. 3d 646, 656 n.6 (1988)  
23 (“The distributor is normally in vertical privity with the manufacturer, and the ultimate retail  
24 buyer is normally in vertical privity with the dealer. But if the retail buyer seeks warranty  
25 recovery against a manufacturer with whom he has no direct contractual nexus, the

1 manufacturer would seek insulation via the vertical privity defense.”); Harlan v. Roadtrek  
2 Motorhomes, Inc., No. 07-CV-686, 2009 WL 928309 (S.D. Cal. April 2, 2009) (granting  
3 motion for summary judgment on implied warranty claims because plaintiffs purchased  
4 motor home from dealer and were not in vertical privity with defendant-manufacturer).

5 Because it is clear on the face of the complaints that plaintiffs cannot establish privity  
6 with Toyota, their implied warranty claims fail as a matter of law and should be dismissed.

7 D. Plaintiffs Fail to State a Claim For Breach of the Implied Warranty  
8 of Fitness for a Particular Purpose

9 The heading of Roberts’ Fourth Claim for Relief states “Breach of Implied Warranties  
10 of Merchantability and Fitness for a Particular Purpose.” However, the First Amended  
11 Complaint does not contain any allegations to support a “particular purpose” claim.  
12 Instead, plaintiff alleges Toyota “impliedly warranted . . . that the subject vehicle was of  
13 merchantable quality and safe for the use for which it was intended by the defendants,  
14 namely, for the purpose of use as a passenger vehicle and other related activities” Roberts  
15 ¶ 173. At best, plaintiff’s conclusory allegation might be applied to an “ordinary purpose”  
16 claim. A “particular purpose” claim “envisages a specific use by the buyer which is peculiar  
17 to the nature of his business.” American Suzuki Motor Corporation v. Superior Court  
18 (1995) 37 Cal. App. 4th 1291, 1295, n.2. Nothing that has been alleged or even  
19 contemplated in Roberts’ First Amended Complaint would support a “particular purpose”  
20 claim. Purchasing a passenger vehicle for the purpose of transportation fits into the rubric  
21 of a general or ordinary purpose. Id. Plaintiffs have failed to allege facts to support a  
22 breach of implied warranty of merchantability and fitness for a particular purpose. To the  
23 extent nothing in the pleading allows for the inference that recovery under such a theory is  
24 even possible (much less plausible) the dismissal of this claim should be with prejudice.

25 ///

E. Plaintiffs Have Not Alleged What Express Warranty Toyota Allegedly Breached

Express warranties are created by “affirmation[s] of fact or promise made by the seller to the buyer” related to the sale of the product. Cal. Com. Code § 2313, subd. (1)(a). Plaintiffs’ breach of express warranty claim fails because plaintiffs have not referenced any affirmation of fact or promise made by the Toyota Defendants that would be effective to show some express obligation on the part of the defendants. While plaintiffs complain that the Toyota Defendants have “touted the reliability and safety of its vehicles” (Scott ¶ 70) and warranted that its vehicles were “safe to operate” (Akamike ¶ 168; see ¶ 169), such an “affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty.” Cal. Com. Code § 2313, subd. (2). This claim should be dismissed.

Plaintiffs allege that Toyota breached an express warranty of merchantability when it sold vehicles alleged to be defective. Scott ¶ 139; Akamike ¶ 169. Specifically, plaintiffs allege that Toyota “expressly warranted to plaintiff[s] and foreseeable users of the [vehicle] that the [vehicle] and the component parts thereof were fit for the purpose for which they were intended to be used and were free from manufacturing design defects.” Scott ¶ 139. Plaintiffs do not include the express language warranting each particular vehicle’s fitness for the intended use. Accordingly, plaintiffs’ claim for breach of express warranty should be dismissed.

It is anticipated that plaintiffs will point to the “uniform written statement” alleged to be contained in Toyota’s warranty and maintenance guides. The “uniform written statement” is recited in the complaint as follows:

At Toyota, our top priority is always our customers. We  
know your Toyota is an important part of your life and

1 something you depend on every day. That's why we're  
2 dedicated to building products of the highest quality and  
3 reliability . . . Our goal is for every Toyota customer to enjoy  
4 outstanding quality, dependability, and peace of mind ..."

5 Scott ¶¶ 63, 121.

6 As will be discussed below, courts have consistently held that this type of  
7 promotional language is not actionable as an express warranty since it is considered  
8 Toyota's opinions about the quality and reliability of its vehicles. The same is true of  
9 representations by the Toyota Defendants that its ultimate goal is "making a vehicle that is  
10 safe for everybody." Akamike ¶ 168. As noted, express warranties are created by a  
11 sellers' affirmation of fact or promise, not an opinion or commendation of its product. Cal.  
12 Com. Code § 2313, subd. (1)(a), (2). As shown in section G, subsection 4 below, language  
13 containing words such as "reliable" and "quality" is "incapable of objective verification and  
14 not expected to induce reasonable customer reliance." Anunziato v. eMachines, Inc., 402  
15 F. Supp. 2d 1133, 1140 (C.D. Cal. 2005) (quoting Summit Technology, Inc. v. High-Line  
16 Medical Instruments, Co., 933 F. Supp. 918, 913 (C.D. Cal. 1996)). For this reason,  
17 whether this particular claim survives will depend upon plaintiffs being able to direct the  
18 Court's attention to an example of an express warranty that was breached when any  
19 particular vehicle experienced a sudden unintended acceleration event. To the extent  
20 plaintiffs are unable to do this, this claim should be dismissed.

21 F. Plaintiffs' Claims for Breach of the Covenant of Good Faith and Fair  
22 Dealing Fails Because Plaintiffs Have Not Alleged a Contract Exists  
Between the Parties

23 Plaintiffs conclude that the Toyota Defendants breached the covenant of good faith  
24 and fair dealing by placing a vehicle that they claim has an unidentified defect into the stream  
25 of commerce. Akamike ¶ 183. A claim for breach of the covenant of good faith and fair

1 dealing requires a contractual relationship between the parties and some specific contractual  
2 obligation on the part of the Toyota Defendants. Racine & Laramie, Ltd. v. Department of  
3 Parks & Recreation (1992) 11 Cal. App. 4th 1026, 1031. Here, plaintiffs do not and cannot  
4 allege that a contractual relationship existed between these parties. For this reason, this  
5 claim should be dismissed with prejudice.

6 G. Plaintiffs' Claims for Fraudulent Concealment Should Be Dismissed  
7 Because Plaintiffs Failed to Sufficiently Allege Fraud

8 Plaintiffs claim that Toyota fraudulently concealed material facts concerning the  
9 ETCS-i. As is clear from the pleadings, the scant factual allegations in the complaints do not  
10 support a claim for common law concealment nor do they support a claim that Toyota's  
11 promotional materials are misleading. Plaintiffs have failed to plead fraud with the requisite  
12 particularity under Rule 9(b) and plaintiffs have failed to show that Toyota had a duty to  
13 disclose information about the ETCS-i to the plaintiffs. The parties do not have a fiduciary or  
14 confidential relationship, nothing about Toyota's conduct created such a duty or relationship,  
15 and plaintiffs' fraud claims should be dismissed.

16 1. Plaintiffs' Fraudulent Concealment Claims Fail Because  
17 Toyota Had No Duty to Disclose Facts about an Alleged  
18 Defect

19 Plaintiffs' fraudulent concealment claims are based on the unfounded  
20 allegations that Toyota actively concealed the existence of a defect in their vehicles and  
21 misrepresented the condition of their products as safe in its advertising and warranty  
22 materials. See Roberts ¶¶ 3-4, 20, 105-106, 137, 180-188; Scott ¶¶ 63-126; Akamike ¶¶  
23 15, 32, 117, 121, 130, 139-166. More specifically, plaintiffs allege that:

24 1. Toyota was aware that the vehicles in question were defective and had  
25 a propensity to accelerate suddenly. Roberts ¶¶ 105, 181; Scott ¶ 63; Akamike ¶ 140;

26 ///



2. Toyota fraudulently concealed from and/or failed to warn plaintiffs of the defect in its vehicles. Roberts ¶ 182;

3. Toyota had a duty to disclose and warn plaintiffs about the alleged defects in its vehicles. Roberts ¶ 183; Scott ¶ 120; Akamike ¶ 141;

4. This alleged duty to disclose arose because Toyota (a) occupied a superior position of knowledge regarding the condition of its vehicles; (b) advertised the safety and quality of the subject vehicles without revealing their alleged defective nature; and (c) fraudulently and affirmatively concealed the alleged defective nature of the subject vehicles. Roberts ¶ 183; Scott ¶ 120; Akamike ¶¶ 140, 143;

5. Toyota concealed material facts concerning its vehicles for the purpose of inducing plaintiffs to purchase and operate Toyota vehicles. Roberts ¶ 184; Akamike ¶ 143;

6. If Toyota had revealed the existence and nature of the alleged defects to the plaintiffs, they would not have purchased the subject vehicles. Roberts ¶ 185; Scott ¶ 120; Akamike ¶ 144.

California Civil Code section 1709 makes liable for damages "one who willfully deceives another with intent to induce [that person] to alter his position to his injury or risk." Fraudulent concealment is defined in section 1710 as "the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact." Cal. Civ. Code § 1710. An action for fraudulent concealment would necessarily allege facts to support a claim that: (1) Toyota concealed or suppressed a material fact; (2) Toyota had a duty to disclose the material fact to the plaintiffs; (3) Toyota's concealment or suppression of the material fact was purposeful with an intent to defraud the plaintiffs; (4) plaintiffs were unaware of the fact and would not have acted as they did if they had known of the suppressed or concealed fact;



1 and (5) resulting damage from the fraud. See Superior Dispatch, Inc. v. Insurance Corp. of  
2 New York (2009) 97 Cal. Rptr. 3d 533, 550.

3 Plaintiffs have not and cannot allege that Toyota had an independent duty to  
4 disclose facts regarding an allegedly defective ETCS-i. It is well established that although  
5 material facts are known to one party and not the other, failure to disclose them is ordinarily  
6 not actionable fraud unless there is some fiduciary or other confidential relationship giving  
7 rise to a duty to disclose. See Mesmer v. White (1953) 121 Cal. App. 2d 665, 670 (no  
8 special duty to disclose material facts where parties deal at arm's length and are each  
9 represented by counsel throughout the negotiation, preparation and execution of contract);  
10 see also 5 Witkin, Summary of Calif. Law (10th ed. 2007) Torts, § 794, at 1149-50. Here,  
11 plaintiffs do not and cannot allege that Toyota has a fiduciary or other confidential  
12 relationship with plaintiffs. Accordingly, plaintiffs' fraudulent concealment claim based on  
13 Toyota's alleged failure to disclose facts about the ETCS-i fails.

14 Where there is no fiduciary relationship between the parties, failure to disclose a  
15 material fact in a transaction will not amount to an actionable fraud unless one of the  
16 following special circumstances exists: (1) the defendant has exclusive knowledge of  
17 material facts not known to the plaintiff; (2) the defendant actively conceals a material fact  
18 from the plaintiff; and (3) the defendant makes partial representations and also suppresses  
19 some material fact. Falk v. General Motors Corp., 496 F. Supp. 2d 1088, 1095 (N.D. Cal.  
20 2007). Again, plaintiffs completely fail to allege facts establishing that one of these other  
21 "duty to disclose" circumstances exist here.

22 2. Toyota Did Not Have Exclusive Knowledge of Material Facts  
23 that Were Not Known or Knowable to Plaintiffs

24 To successfully allege that Toyota's purported nondisclosure or concealment of a  
25 defect constituted actionable fraud, plaintiffs must allege facts to support a contention that

1 Toyota had exclusive knowledge of material facts not known to plaintiffs. The complaints  
2 do not include sufficient facts to support plaintiffs' claim that Toyota had a duty to disclose  
3 under this theory. Plaintiffs claim of Toyota's exclusive knowledge in the Roberts complaint  
4 is the conclusory allegation that "defendants were in a superior position to know the true  
5 state of the facts about the hidden defect in the subject vehicle." ¶ 183. The Scott  
6 complaint similarly concludes that "Toyota . . . had exclusive knowledge of the dangerously  
7 defective nature of the acceleration control and throttle system on the subject vehicles" (¶  
8 71) and that "Toyota had exclusive and superior knowledge of the defects and . . . plaintiff .  
9 . . was ignorant of and was unaware of the existence and nature of the defects" (¶ 120).  
10 The Akamike complaint fares no better by concluding that on information and belief "Toyota  
11 knew for years that its vehicles were susceptible to malfunctions that could result in  
12 unintended acceleration and braking conditions and serious safety issues including injury  
13 and death." ¶ 130. These generalized statements are insufficient to establish the factors  
14 required to create a duty to disclose. Tietsworth v. Sears, Roebuck and Co., No. 5:09-CV-  
15 00288, 2009 WL 3320486, at \*4 (N.D. Cal. Oct. 13, 2009) (conclusory allegations that  
16 "[d]efendants were in a superior position to know the truth about the Machines" and  
17 "actively concealed" the defect are insufficient to establish a duty to disclose.)

18 Moreover, it is clear even from plaintiffs' threadbare factual allegations that  
19 defendants' knowledge of its vehicles' alleged susceptibility to sudden acceleration events  
20 was not "exclusive." That is, plaintiffs' recitation of the public record is just that—public and  
21 available to plaintiffs and others. See Warner Construction Corp. v. City of Los Angeles,  
22 (1970) 2 Cal. 3d 285, 294 (in the absence of a fiduciary or confidential relationship, non-  
23 disclosure of material facts is actionable if the facts are only known to defendant or not  
24 reasonably discoverable by plaintiff). Even a cursory review of the exemplar complaints  
25 demonstrate plaintiffs going to extraordinary lengths to emphasize that Toyota vehicles

1 were repeatedly tested over the past decade in response to unsubstantiated complaints  
2 about surging and acceleration events, including investigations of Toyota's electric throttle  
3 control system. See Roberts ¶¶ 50-52, 55-57, 59-60, 65, 68-69, 71, 74-77(a); Scott ¶¶ 26-  
4 30, 32-33, 35-43, 45-49, 73-77; Akamike ¶¶ 34, 45, 47-48, 50, 53-55, 58-59, 61-66, 72-73,  
5 76, 78-79, 90. Therefore, the very "facts" plaintiffs cite concerning alleged sudden  
6 acceleration events in Toyota vehicles relating to the electronic throttle control system were  
7 not only known and accessible to NHTSA and others, but as a public record were available  
8 to plaintiffs as well.

9 3. Toyota Did Not Conceal Any Material Facts Where No Plaintiff  
10 Alleges Having Made an Investigation or Having Sought  
Information from Toyota

11 Plaintiffs' claims that Toyota actively concealed discovery of a material fact from  
12 plaintiffs similarly fail. At the outset, it should be noted that while plaintiffs put considerable  
13 effort into attempting to allege that Toyota concealed or suppressed material facts, plaintiffs  
14 rely on mere conclusions in efforts to establish Toyota's underlying duty to disclose these  
15 material facts. Active concealment "usually consists either in actively hiding something  
16 from the other party or preventing him or her from making an investigation that would have  
17 disclosed the true facts." 1 Witkin, Summary of Calif. Law (10th ed. 2005) Contracts, §  
18 292, at 319. Because plaintiffs cannot allege facts supporting instances of Toyota's active  
19 concealment of information, i.e., Toyota's hiding information from the plaintiffs or preventing  
20 plaintiffs from making an investigation, plaintiffs' allegations rely on conclusions,  
21 conjectures, innuendoes, implications, and assumptions concerning Toyota's interaction  
22 with NHTSA and others in plaintiffs' failed effort to show a pattern and practice of Toyota's  
23 active concealment of facts from the plaintiffs. See Roberts ¶¶ 49-139; Scott ¶¶ 62-117;  
24 Akamike ¶¶ 34-96. In fact, the Scott complaint summarily concludes that the Toyota  
25 Defendants "thus concealed from NHTSA and the public an entire universe of potentially  
26

relevant complaints.” ¶ 82. Later, Scott declares without factual support that “Toyota was able to actively conceal from the public . . . the truth about the existence of the dangerously defective acceleration control and throttle system in the subject vehicles.” ¶ 112; see ¶¶ 113-114. Thus, no individual plaintiff alleges that he attempted to investigate, and no individual plaintiff alleges that he sought from Toyota information that was subsequently hidden. Toyota was not under a duty to disclose information that plaintiffs did not seek. This claim should be dismissed.

4. Toyota’s Opinions Regarding the Quality and Reliability of Its Products Are Not Actionable as Representations of Fact

The final special circumstance under which a duty to disclose material facts can be found is where the defendant makes partial representations but also suppresses some material fact. Plaintiffs conclude that rather than reveal the unidentified alleged defects in its vehicles, Toyota continued to represent that their vehicles were safe for their intended use. Roberts ¶¶ 38-39, 173; Scott ¶¶ 63, 121; Akamike ¶ 153. The Scott complaint alleges that “instead of disclosing the truth about the dangerous propensity of Toyota-manufactured vehicles to suddenly and unintentionally accelerate, California consumers were given assurances that their vehicles were safe and defect free.” ¶ 63; see Roberts ¶ 2; Akamike ¶ 153. The Scott complaint cites a maintenance guide touting Toyota vehicles as high quality, reliable, and dependable. ¶ 63. Plaintiffs complain that statements like these, i.e., that Toyota vehicles are safe and reliable, are only partially true and create a duty for Toyota to disclose the entire truth, i.e., that the vehicles were dangerously defective. Scott ¶ 121; Akamike ¶ 151.

The Toyota Defendants are alleged to have commended the vehicles as “safe” and “of the highest quality and reliability.” Scott ¶¶ 63, 121. The Toyota Defendants are further alleged to have claimed as a goal that each of its customers to enjoy “outstanding quality,

1 dependability, and peace of mind.” Id.; see Roberts ¶¶ 38-39; Akamike ¶¶ 153, 168.  
2 Courts do not consider such statements as a representation of actionable facts, but rather  
3 “generalized, vague, and unspecified assertions” that a reasonable consumer would  
4 understand to be a promotional statement. Oestreicher v. Alienware Corporation, 544 F.  
5 Supp. 2d 964, 973 (N.D. Cal. 2008). Accordingly, such “product superiority claims that are  
6 vague or highly subjective often amount to non[-]actionable puffery [while] misdescriptions  
7 of specific or absolute characteristics of a product are actionable.” Southland Sod Farms v.  
8 Stover Seed Co., 108 F.3d 1134, 1145 (9th Cir. 1997). Interestingly, some of the very  
9 words plaintiffs attempt here to characterize as partial representations of material fact, i.e.,  
10 “highest quality” and “reliability”, have been specifically held to be non-actionable by this  
11 Court. Anunziato, 402 F.Supp.2d at 1140-41. Advertisements using the word  
12 “dependable” have been held not likely to mislead a reasonable consumer. Stickrath v.  
13 Globalstar, Inc., 527 F. Supp. 2d 992, 999 (N.D. Cal. 2007). Since the representations  
14 alleged to have been made to consumers about its vehicles in Toyota’s advertising  
15 materials are not false statements of fact, but rather non-actionable promotional  
16 statements, plaintiffs have not alleged in the complaints an instance of defendants making  
17 a partial disclosure of a material fact by that would give rise to a duty to disclose  
18 information about an allegedly defective ETCS-i.

19 For these same reasons, plaintiffs’ claims for intentional and negligent  
20 misrepresentation are not actionable. Specifically, plaintiffs allege that the Toyota  
21 Defendants’ statements that its vehicles were “safe” and “reliable” and that Toyota was a  
22 “reputable and reliable business” were misrepresentations of fact. Akamike ¶¶ 149-166.  
23 However, as already demonstrated, the statements plaintiffs allege to be  
24 misrepresentations are not actionable because they express the Toyota Defendants’  
25 “judgment as to quality, value, authenticity, or similar matters.” CACI No. 1904. In other

1 words, these are opinions and cannot form the basis for a misrepresentation claim. Rest.  
2 (2d) Torts § 538A. Plaintiffs' claims for intentional and negligent misrepresentation should  
3 therefore be dismissed as a matter of law.

4 Plaintiffs may argue that Toyota had a duty to disclose because the alleged defect  
5 involved a safety risk. See Roberts ¶ 5; Scott ¶ 23; Akamike ¶ 141. This is a  
6 misapplication of the law. The fact that a safety risk is involved does not alone give rise to  
7 a duty to disclose, but merely satisfies the plaintiff's burden of showing that the alleged  
8 nondisclosure relates to a material fact. See Falk, 496 F. Supp. 2d at 1096. Plaintiffs are  
9 still obligated to allege facts establishing that Toyota had exclusive knowledge of an alleged  
10 defect or that Toyota actively concealed an alleged defect. As explained above, plaintiffs  
11 have not and cannot do this.

12 H. Plaintiffs' Claims for Violation of California Business and Professions  
13 Code §§ 17200 and 17500 Fail Because Plaintiffs Have Not Identified  
14 Any False or Misleading Advertising Done by Toyota; and the Statute  
Does Not Apply to Out-of-State Residents

15 Plaintiffs allege that defendants made false or misleading representations in their  
16 advertising materials<sup>2</sup>. Akamike ¶¶ 191-208. Plaintiffs do not identify with particularity any  
17 advertisements disseminated by Toyota that would constitute a false or misleading statement.  
18 Instead, plaintiffs summarily conclude that defendants made misrepresentations in the  
19 "repeated claims in radio, television, and internet that Toyota vehicles were safe and/or  
20 reliable, and that Toyota was a reputable business." Akamike ¶ 204. In fact, plaintiffs do not  
21  
22

23 <sup>2</sup> The plaintiffs represented by Lieff Cabraser Heiman & Bernstein, LLP ("Lieff  
24 Cabraser") amended a number of complaints, including Roberts within the week before  
25 this motion was filed. Plaintiffs represented by Lieff Cabraser have dropped the false  
26 advertising claim. To the extent many plaintiffs' complaints were modeled after the  
ones prepared by Lieff Cabraser, these too should be amended and drop the false  
advertising claim.

reference any advertisements promoting Toyota's vehicles.<sup>3</sup> An allegation that this section was violated would require the usual specificity required for fraud claims. See Stearns v. Select Comfort Retail Corp., No. 08-2746, 2009 WL 1635931, at \*11 (N.D. Cal. June 5, 2009); Stickrath, 527 F. Supp. 2d at 997-98. At a minimum, plaintiffs should be required to identify the advertising claimed to be false or misleading.

Even if plaintiffs could successfully identify with particularity any advertising by Toyota that was allegedly false and misleading and not non-actionable puffery, an action under Business & Professions Code sections 17200 and 17500 is unavailable to out-of-state residents. False advertising is included in the definition of unfair competition under the Unfair Competition Law ("UCL"). Cal. Bus. & Prof. Code § 17200. Unless a statute such as the UCL or section 17500 states otherwise, it will not be construed to regulate occurrences outside the state. Diamond Multimedia Systems, Inc. v. Superior Court (1999) 19 Cal. 4th 1036, 1058-59. The UCL does not contain an "express declaration that it was designed or intended to regulate claims of non-residents arising from conduct occurring entirely outside of California." Norwest Mortgage, Inc. v. Superior Court (1999) 72 Cal. App. 4th 214, 222. Norwest held that UCL claims could not be asserted by non-California residents for purchases that occurred in another state. Id. Thus, out-of-state residents who seek relief for alleged violations under section 17200 and 17500 will have to allege facts that would allow an inference that the harm, i.e., the purchase of the plaintiffs' vehicle, can be regulated by these statutes.<sup>4</sup> At a minimum, Roberts, Scott and Akamike, residents of New York, Florida and Texas, respectively, must allege that the vehicles were purchased in California, which they likely cannot do. Unless and

///

<sup>3</sup> The Scott complaint includes one example of Toyota promotional copy (¶¶ 63, 121), but does not include a false advertising claim for relief, nor does the promotional copy support such a claim.

<sup>4</sup> See Anunziato, supra, 402 F.Supp.2d 1133, 1136-37, 1136-37 (injury in fact occurs when product being advertised in violation of this section is purchased).



1 until out-of-state plaintiffs can so allege, claims made under these California statutes should  
2 be dismissed.

3 I. Plaintiffs' Have Not Pled Their Fraud Claims with the Particularity  
4 Required by Rule 9(b)

5 Claims predicated on alleged fraud must satisfy the heightened pleading  
6 requirements of Federal Rule of Civil Procedure 9(b). See Stearns, 2009 WL 1635931 at  
7 \*\*9-11; Neilson v. Union Bank of Cal., N.A., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003).  
8 Both allegations of concealment and allegations of affirmative misrepresentations are  
9 subject to the heightened pleading requirements of Rule 9(b). Stearns, 2009 WL 1635931  
10 at \*9. Under Rule 9(b), Plaintiffs must plead with specificity the facts constituting the  
11 alleged fraud. Id. At a minimum, Rule 9(b) requires that plaintiffs plead facts such as "time,  
12 place, persons, statements, and explanations of why the statements are misleading."  
13 Ayala v. World Savings Bank, FSB, 616 F. Supp. 2d 1007, 1011 (C.D. Cal. 2009). In other  
14 words, the "who, what, when, where, and how" of the fraud must be alleged. Cooper v.  
15 Pickett, 137 F. 3d 616, 627 (9th Cir. 1997).

16 Here, plaintiffs fail to plead their fraud claims with the requisite level of specificity,  
17 and accordingly, their claims should be dismissed. See Kinkade v. Trojan Express, LLC,  
18 No. 08-1362, 2009 WL 799390 (C.D. Cal. March 23, 2009) (dismissing fraud claim for failure  
19 to satisfy Rule 9(b)'s pleading requirement). The pleadings here are rife with vague and  
20 unspecified allegations that Toyota failed to disclose the fact that the subject vehicles  
21 contained an unidentified defect. Such "conclusory allegations do not come close to  
22 satisfying the pleading requirements of Rule 9(b)." See Stearns, 2009 WL 1635931, at \*9.

23 Notably, plaintiffs fail to identify a single instance where Toyota directed a single  
24 material representation toward a single plaintiff, much less a material representation made  
25 with knowledge of its falsity. The complaints fall far short of setting forth the "who, what,



1 when, where, and how" required to state a fraud claim. Instead, plaintiffs' claims are  
2 premised solely upon the vague and unsupported allegations that Toyota concealed some  
3 unspecified material facts from some unspecified persons at some unspecified time, at  
4 some unspecified place, through some unspecified medium. This is not enough.

5 V. CONCLUSION

6 For these and the foregoing reasons, the Toyota Defendants respectfully request  
7 that the Court grant this Motion to Dismiss and dismiss plaintiffs' claims.

8 Dated: September 13, 2010

Respectfully submitted,

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